RECENT DECISIONS.

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ADMIRALTY—PILOTS—LIABILITY FOR NEGLIGENCE.—The acts of a pilot whom the vessel was under statutory duty to employ, resulted in a collision, though in operating the vessel he exercised his best judgment in good faith. *Held,* the pilot was answerable to the owners for all damages paid by them. *Guy* v. *Donald* (1907) 157 Fed. 527.

Although the owner of the vessel is not liable *in personam* for the negligence of one employed under a statute of compulsory pilotage, *Homer Ramsdell Transp. Co.* v. *Compagnie Générale Transatlantique* (1895) 63 Fed. 845; affd. (1901) 182 U. S. 406, the vessel was liable *in rem, The China* (1868) 7 Wall. 53, being regarded by the maritime law as a juridical person, capable of committing wrongs and liable for delinquencies. *Ralli* v. *Troop* (1894) 157 U. S. 386, 403. The obvious practical basis for thus impressing an admiralty lien is the desire to furnish a certain security of indemnity to the injured party. Although the pilot's liability is not that of an insurer, *The Garfield* (1884) 21 Fed. 474, his failure to exercise the degree of skill commonly possessed by others in that employment is a maritime tort, *Sideracudi* v. *Mapes* (1880) 3 Fed. 873, and renders him in turn liable over to the vessel despite the *bona fide* exercise of his best judgment. *Donald* v. *Guy* (1903) 127 Fed. 228.

BANKRUPTCY—PARTNERSHIP—TRUSTEE'S POWER TO TAKE PROPERTY OF NON-BANKRUPT PARTNER.—A partnership, as such, was adjudicated bankrupt. *Held,* its trustee could not take the individual property of a partner who was not bankrupt in order to pay partnership debts. *In re Bertenshaw* (1907) 157 Fed. 363. See NOTES, p. 391.

CARRIERS—SPECIAL CONTRACT—NOTICE WITHIN THIRTY DAYS.—The defendant moved to dismiss an action for damage to freight on the ground that the plaintiff had failed to prove compliance with a provision of the bill of lading which required notice within thirty days. *Held,* such notice was not a condition precedent to recovery but was matter of defence. *Hoye* v. *Penn. R. Co.* (N. Y. 1908) 83 N. E. 586.

It is generally conceded that a requirement of notice of injury to freight is valid, though it limits the carrier's liability for negligence, since it prevents fraud upon him and places no burden on the shipper. *Express Co.* v. *Caldwell* (1874) 21 Wall. 264, 268; cf. 6 COLUMBIA LAW REVIEW 597; contra, by statute, *Grieve* v. *Illinois etc. Ry.* (1898) 104 Ia. 659; by constitution, *Brown* v. *Illinois etc. Ry.* (1897) 100 Ky. 525. But if the period within which notice is required is unreasonably short, see Hutchinson, Carriers, 3rd Ed., § 443; *Queen of the Pacific* (1900) 180 U. S. 49, 55, a substantial compliance is sufficient, *B. & O. Express Co.* v. *Cooper* (1889) 66 Miss. 558; *Louisville etc. Ry.* v. *Landers* (1902) 135 Ala. 504; contra, *Cox* v. *Central etc. R. R.* (1898) 170 Mass. 129, 138 (holding notice dispensed with). If the shipper sues on the carrier's common law liability, the burden of proving that the damage arose from an exemption therefrom is on the carrier, *Schaeffer* v. *Phila. etc. R. R.* (1895) 168 Pa. St. 209, and the same reasons of policy would seem to apply where the suit is on the special contract made to protect him, *Western etc. Co.* v. *Newhall* (1860) 24 Ill. 466; contra, *The Westminster* (1904) 126 Fed. 608, though the requirement might well be construed on strict contract principles as a condition precedent. *Kalina* v. *R. R. Co.* (1904) 69 Kan. 172. Thus the carrier must plead the special contract, *Westcott* v. *Fargo* (1875) 61 N. Y. 514;

Kansas etc. R. Co. v. *Page* (1901) 69 Ark. 256; contra, *Kalina* v. *R. R. Co., supra*, or the recovery will be on the common law liability. Consequently the rule of the principal case is correct.

CONSTITUTIONAL LAW—CLASS LEGISLATION—BOTTLING ACTS.—A penal statute forbade the use, without the owner's written consent, of registered bottles or boxes employed in the sale and handling of merchandise, food or beverages, authorizing recovery thereof by search warrant. *Held*, the act was unconstitutional. *State v. Schmuck* (1908) 77 Oh. St. 128.

A statute is not invalid as class legislation, if it is based upon reasonable grounds, is reasonably related to the object to be accomplished, and affects alike all persons similarly situated. 8 COLUMBIA LAW REVIEW 318. Laws safeguarding property peculiarly in need of protection, such as mechanics' lien laws, *Barrett* v. *Millikan* (1901) 156 Ind. 510, boarding-house keepers' lien laws, see *Barnett* v. *Walker* (N. Y. 1902) 39 Misc. 323, or facilitating the prevention of fraud or imposition, such as acts protecting union labels, *Tracy* v. *Banker* (1898) 170 Mass. 266; *Perkins* v. *Heert* (1899) 158 N. Y. 306, are valid; and it would seem that the legislation in the principal case protecting property especially liable to fraudulent misuse is constitutional. *Commonwealth* v. *Anselvich* (1904) 186 Mass. 376; *People* v. *Cannon* (1893) 139 N. Y. 32; contra, *Horwich* v. *Laboratory* (1903) 205 Ill. 497. The terms of the statute are broad enough to include all persons similarly situated. The search warrant clause, however, is clearly unconstitutional, such warrants being unavailable to maintain private rights. *Robinson* v. *Richardson* (Mass. 1859) 13 Gray 454; *Lippman* v. *People* (1898) 175 Ill. 101. Their use is confined to public prosecution for the detection, *Stone* v. *Dana* (Mass. 1842) 5 Met. 98, and prevention of crime. *People* v. *Noelke* (N. Y. 1883) 29 Hun 461. The decision in the principal case may be sustained on this ground, though not on the ground of unwarranted class legislation.

CONTRACTS—ILLEGALITY—CORRUPTION OF AGENT.—The plaintiff sued to recover the purchase price of goods sold to the defendant whose buyer was receiving a commission of five per cent. on all purchases from the plaintiff. Penal Code § 384r made the taking and the giving of such commission misdemeanors. *Held*, two justices dissenting, no action lay, although the defendant retained and used the goods. *Sirkin* v. *Fourteenth St. Store* (1908) 108 N. Y. Supp. 830.

The transaction cannot be looked on as an entire contract so as to bring it within the rule that when part of an entire consideration is illegal, the contract is unenforcible; *Gerlach* v. *Skinner* (1885) 34 Kan. 86; *Brieske* v. *Ry. Co.* (1898) 82 Ill. App. 256; for the contract of commission was made with the agent as individual, independent of the principal contract. But cf. *Standard Lumber Co.* v. *Butler Ice Co.* (1906) 146 Fed. 359. Nor was it necessary, as demanded by a common though inaccurate test, to rely on the illegal contract to establish the right on the principal contract. Chitty, Contracts, 657 et seq. When the direct inducing cause of a contract is illegal this prevents recovery whether executory, or executed on one side. *State* v. *Cross* (1888) 38 Kan. 696; Bishop, Contracts, 2nd Ed., § 470; 7 COLUMBIA LAW REVIEW 618. But at common law a commission contract was illegal, as designed to inflict a tort on the principal; *Grant* v. *Gold Exploration Co.* (1899) 69 L. J. Q. B. 150; and yet the principal contract was not void, but voidable as for fraud. *Smith* v. *Sorby* (1875) 3 Q. B. D. 552. The remedies of the principal were to rescind, *Panama & S. Pacific Tel. Co.* v. *India Rubber Co.* (1875) L. R. 10 Ch. 515, to recover from the agent in quasi-contract the amount of the commission, *Mayor* v. *Lever* (1891) 1 Q. B. D. 168, and to recover from the agent and the seller jointly and severally any damages sustained by reason of the fraud. *City* v. *Simmons* (1890) 150 Mass. 461. Since, therefore, at common law the commission contract though illegal was not

considered an inducing cause so as to render the principal contract void, how the fact that it is now criminal can make it such is unclear; and the principal case thus seems incorrect. *City* v. *Pertz* (1895) 66 Fed. 427; cf. *Cody* v. *Dempsey* (1903) 86 App. Div. 335; *Sinnott* v. *German Am. Bank* (1900) 164 N. Y. 386; contra, semble. *Standard Lumber Co.* v. *Butler Ice Co., supra.*

CONTRACTS—NON-CONTRACTUAL OFFER—TORT LIABILITY.—The defendant, a newspaper, conducted a financial advice column inviting inquiries from readers. The plaintiff wrote requesting the name of a good stock broker, which the defendant furnished without proper investigation. The plaintiff forwarded funds to the broker who misappropriated them. *Held*, the plaintiff's letter created a contract for the breach of which, in the failure to use due care, the defendant was liable. *De Le Bere* v. *Pearson, Limited* [1908] 1 K. B. 280.

To constitute an offer, a statement must evince an intention on the part of the offerer to assume a new legal liability. *Harvey* v. *Facey* [1893] A. C. 552. Thus a mere advertisement is generally not an offer, *Spencer* v. *Harding* (1870) L. R. 5 C. P. 561, nor a statement of intention to act in a certain manner. *Harris* v. *Nickerson* (1873) L. R. 8 Q. B. 286. The principal case can hardly be sustained on the ground of contract. It might, however, be supported on the ground of tort. Generally the giving of gratuitous advice and the innocent misrepresentation of a fact will, in the absence of contract, create no liability, because there is ordinarily an affirmative intention that the matter shall not be capable of having legal effect. *Shiels* v. *Blackburne* (1789) 1 H. Bl. 158; *Fish* v. *Kelly* (1864) 17 C. B. N. S. 194. Where this intention does not exist, one assuming a gratuitous obligation is under no duty to perform, since, otherwise, a contract liability would in effect be imposed without consideration; *Thorne* v. *Deas* (1809) 4 Johns. 84; but if performance is undertaken, there is a duty of care owing to one who is induced to rely thereon. *Gill* v. *Middleton* (1870) 105 Mass. 477. So in the principal case, while there was no *animus contrahendi*, neither were the relations of the parties such that they might be presumed to have waived any legal consequences which would ordinarily attach to their acts.

CONTRACTS—OUSTING COURTS OF JURISDICTION.—After recovering judgment against the defendants, the plaintiff, for a valuable consideration, promised not to sue thereon in New York, but in Russia, if at all. *Held*, the agreement was valid. *Gitler* v. *Russian Co.* (1908) 108 N. Y. Supp. 793.

In accordance with the well-settled rule that agreements withdrawing future controversies from the jurisdiction of the courts are illegal as obstructing the course of justice, *Ins. Co.* v. *Morse* (1874) 20 Wall. 445; *Miles* v. *Schmidt* (1897) 168 Mass. 339, stipulations to refer such disputes to arbitration, *Kill* v. *Hollister* (1746) 1 Wils. 129; *Trott* v. *Ins. Co.* (1860) 1 Cliff. 439; *Wood* v. *Humphrey* (1873) 114 Mass. 186, to sue in a specified county, *Nute* v. *Ins. Co.* (Mass. 1856) 6 Gray 174; contra, *Greve* v. *Ins. Co.* (N. Y. 1894) 81 Hun 28, or state, *Reichard* v. *Ins. Co.* (1862) 31 Mo. 518, in a certain port, *Shipping Co.* v. *Lehman* (1889) 39 Fed. 704, in a foreign court, *Slocum* v. *Assurance Co.* (1890) 42 Fed. 235, or to refrain from suing in the federal courts are invalid. *Doyle* v. *Ins. Co.* (1876) 94 U. S. 535; contra, *Mittenthal* v. *Mascagni* (1903) 183 Mass. 19. But agreements to refer some preliminary matter, e. g. the mode of fixing damages, are unobjectionable, since they deny a resort to the courts only until such condition precedent is fulfilled. *Canal Co.* v. *Coal Co.* (1872) 50 N. Y. 250; *Scott* v. *Avery* (1856) 5 H. L. Cas. 811. On the other hand, agreements limiting the right to sue in specific civil controversies or upon existing obligations, *Ins. Co.* v. *Morse, supra*, operate as a bar to any subsequent suit, *Armstrong* v. *Masten* (N. Y. 1814) 11 Johns. 188; *Ry. Co.* v. *Harris* (1890) 126 Ind. 7, forbearance or promise to forbear suit being

universally regarded as a good consideration, *Goodman* v. *Simonds* (1857) 20 How. U. S. 343, 370, unless public interests intervene, *Clark* v. *Spencer* (1875) 14 Kan. 398 (agreement to withdraw a plea of usury); *Amestoy* v. *Transit Co.* (1892) 95 Cal. 311 (agreement not to prevent a public nuisance). The principal case, founded on the distinction between present and future controversies, seems correctly decided.

COPYRIGHT — INFRINGEMENT — MUSICAL COMPOSITION. — The complainant owned copyrights of certain songs of which the defendants had prepared and sold perforated records for use in automatic pianos. *Held*, these records were not "copies" within the meaning of the statute, U. S. R. S. § 4952, so as to infringe on the plaintiff's copyrights. *White-Smith Music Pub. Co.* v. *Apollo Co.* (1908) 28 Sup. Ct. 319.

This decision of the Supreme Court finally determines that the legislative enactments on which alone copyright after publication rests, *Wheaton* v. *Peters* (1834) 8 Pet. 591, do not protect the collocation of sounds but only their expression in musical notation. This interpretation, as indicated in 5 COLUMBIA LAW REVIEW 615, accords with what little authority there is in point; and, though narrow, seems forced on the court for want of a more rational test capable of definite application. Since the records in the principal case are mere adjuncts of the valve mechanism, and not intended to be read, the conclusion necessarily followed. The result reached, however, is obviously unfortunate and demands prompt legislative extension of the scope of protection. See concurring opinion of Holmes, J.

CORPORATIONS—EFFECT OF DISSOLUTION ON LEASEHOLDS.—The plaintiff granted to a limited company a seven-year lease on which the defendant was surety. The corporation was dissolved and the plaintiff sued for rent subsequent to its dissolution. *Held*, the plaintiff could not recover. *Hastings Corporation* v. *Setton* (1907) 77 L. J. K. B. 149.

Dicta of old writers, 1 Blackstone 484; cf. Co. Lit. 13b, have stated the rule at common law to be that, on dissolution of a corporation, its land reverts to the donor, the debts due to and from it are extinguished, and its personal chattels go to the Crown: but this rule was of doubtful validity when made, Gray, Perpetuities, §§ 46-51; cf. *Naylor* v. *Brown* (1673) Finch 83; 2 Harv. L. Rev. 165, and except as to goods and chattels, *In re Higgins & Dean* (1899) 68 L. J. Q. B. 198, has not been applied to business corporations in England. As to debts and contracts the rule has been disregarded in America, cf. *Mumma* v. *Potomac* (1834) 8 Pet. 281, 286; contra, *Fox* v. *Horah* (N. C. 1841) 1 Ired. 358, and questioned in England. *In re Higgins, supra.* A leasehold anomalously partakes of the nature of realty, of chattels, and of a contract. In recent English cases the leaseholds of a dissolved corporation have by implication been held not to revert to the donor: *In re General Acc. etc.* (1904) 73 L. J. Ch. 84; *In re Bamore Road* [1906] 1 Ch. 359; cf. *Pryce-Jones* v. *Williams* [1902] 2 Ch. 517; cf. *In re Taylor's Agreement etc.* (1904) 73 L. J. Ch. 557: *Pryce-Jones* v. *Williams, supra*, indicating that they went to the Crown as *bona vacantia*, and *In re Bamore Road, supra* (based on an unreported case decided as to freeholds), holding that the title was suspended till a trustee was appointed. Cf. *In re General Acc. etc., supra.* The principal case disregards these decisions, ignores the analogy to goods and chattels or contracts, and blindly accepts the rule as to the reversion of freeholds and applies it to leaseholds. The analogy of leasehold to contract probably would not have aided in reaching a result, since it is not settled whether the dissolution works an entire extinction of contractual rights or only of remedies. Though in violation of the theoretical difference, the principal case proceeds on the practical similarity between leaseholds and realty.

CORPORATIONS—POWER TO ACT IN CHIEF.—By statute, an affidavit of authority was required to be attached when a chattel mortgage was recorded by

an agent. The vice-president of a mortgage corporation recorded a mortgage without such affidavit. *Held*, that the recording was valid, as the corporation was acting, not through an agent, but in chief. *Am. Soda Fount. Co.* v. *Stolzenbach* (N. J. 1907) 68 Atl. 1078. See NOTES, p. 403.

CRIMINAL LAW—INTERPOSITION IN DEFENSE OF THIRD PARTIES.—A attacked B, the brother of C, with a deadly weapon, B's insults having provoked the quarrel. C, interposing, killed A. *Semble*, C might kill A, though B, who was at fault, could not. *Warnack* v. *State* (Ga. 1908) 60 S. E. 288, 291.

A stranger, in preserving the peace, must act impartially, 1 East P. C. 289, 290; *Barfoot* v. *Reynolds* (1734) 2 Stra. 953, and, though he may kill one committing a violent felony, 1 Whart. Crim. Law, §§ 494, 495; cf. *Stanley* v. *Com.* (1887) 86 Ky. 440; *Glover* v. *State* (1894) 33 Tex. Crim. Rep. 224, the homicide will be justifiable only if necessarily committed. *People* v. *Cole* (N. Y. 1857) 4 Park. Crim. Rep. 35. If the intervener is a relative, his acts are construed as those of a partisan, 1 Hale P. C. 484, and he may use no more force than could the person attacked. *State* v. *Brittain* (1883) 89 N. C. 482; *Smith* v. *State* (1900) 105 Tenn. 305; contra, *State* v. *Linney* (1873) 52 Mo. 40. The assailed, if at fault, 1 Hale P. C. 479, 482; *State* v. *Hatch* (1896) 57 Kan. 420; 3 COLUMBIA LAW REVIEW 526, and, by the weight of authority, though innocent, *Allen* v. *U. S.* (1896) 164 U. S. 492; *State* v. *Rheams* (1885) 34 Minn. 18, must retreat to the wall before killing. Whart., Hom. § 485; see *State* v. *Gardner* (1905) 96 Minn. 318. Thus, under the foregoing rules, in the principal case, a stranger might kill A to prevent B's murder, while B, not having retreated, could not himself take life, nor, if the rule be strictly applied, could C, his brother. To give a stranger, under such circumstances, the right to kill, and withhold it from a relative, appears unreasonable. It would seem that the public interest in the prevention of felonies would be best conserved by allowing a relative the same rights as a stranger.

DOMESTIC RELATIONS—SURVIVORSHIP OF HUSBAND—MARRIED WOMAN'S POLICY ON HUSBAND'S LIFE.—A married woman took out a policy on the life of her husband, payable to herself or her legal representatives. She predeceased him, leaving children surviving. Her will made the husband sole legatee. *Held*, the policy was payable to the wife's representatives; Woodward, J., dissenting, on the ground that, since the wife died intestate as to the policy, it went to the husband as survivor. *Poole* v. *New England Mutual Life Ins. Co.* (1908) 108 N. Y. Supp. 431.

At common law, the husband was entitled for his own benefit *jure mariti*, to administer his wife's estate and reduce her choses in action. 2 Kent Comm. 135; *Squib* v. *Wyn* (1717) 1 P. Wms. 378. If he died after taking out administration, his personal representatives succeeded to his rights. *Whitaker* v. *Whitaker* (N. Y. 1810) 6 Johns. 112. He could not, however, sue without administration, *Grosvenor* v. *Lane* (1741) 2 Atk. 180; and if he failed to take out letters, his representatives obtained no rights, *Betts* v. *Kimpton* (1831) 2 B. & Ad. 273, but the representatives of the wife would hold in trust for the representatives of the husband. *Cart* v. *Rees* (1718) 1 P. Wms. 381; *Whitaker* v. *Whitaker, supra*. Though later statutes enabled the wife to hold separate property and dispose thereof by will, the common law rule prevailed in case of intestacy. *Ransom* v. *Nichols* (1860) 22 N. Y. 110; *Kenyon* v. *Saunders* (1894) 18 R. I. 590. This sole beneficial right of the husband is, however, inconsistent with modern statutes of distribution. See N. Y. Code Civ. Proc. §§ 2732, 2734; *Heirs of Holmes* v. *Adm'r of Holmes* (1856) 28 Vt. 765; *Baldwin* v. *Carter* (1845) 17 Conn. 201. In the principal case, therefore, though the attempted disposal by will was invalid, issue being left surviving, Laws of N. Y. 1896, Chap. 272, § 22; semble, *Bradshaw* v. *Mutual Life Ins. Co.* (1907) 187 N. Y. 347, the policy was payable to the wife's administrator. A contrary view would contravene one purpose of the statute, the protection

of the children. See *Eadie* v. *Slimmon* (1862) 26 N. Y. 1. *Olmsted* v. *Keyes* (1881) 85 N. Y. 593 is distinguishable, since the wife died prior to the enactment of the statute of distributions.

EQUITY—INJUNCTION AGAINST CRIMINAL PROSECUTIONS.—The plaintiffs sought to enjoin the defendant, the Attorney General of Arkansas, from prosecuting them under a statute making it a misdemeanor to deal in "futures," and from interfering with their contract with the defendant Telegraph Company. *Held*, the court could not enjoin criminal proceedings. *Logan & Bryan* v. *Postal Tel. & Cable Co.* (Ark. 1908) 157 Fed. 570.

It is the general rule that equity will not enjoin a criminal prosecution, *In re Sawyer* (1887) 124 U. S. 200; *Kerr* v. *Preston* (1876) L. R. 6 Ch. D. 463, as there is a remedy at law, *Phillips* v. *Mayor* (1878) 61 Ga. 386; *Hemsley* v. *Myers* (1891) 45 Fed. 283; *Stuart* v. *Supervisors* (1876) 83 Ill. 341; see also *Davis* v. *A. S. P. C. A.* (1878) 75 N. Y. 362, and this remedy cannot be waived so as to force the court of equity to decide. *Yates* v. *Batavia* (1875) 79 Ill. 500. Two exceptions to this rule exist. Where the equitable proceedings are ancillary, the same parties and the same right being involved in each suit, the criminal proceedings may be stayed. *York* v. *Pilkington* (1742) 2 Atk. 302; *Harkrader* v. *Wadley* (1898) 172 U. S. 148; *Saull* v. *Browne* (1874) L. R. 10 Ch. A. 64. Where irreparable injury will be inflicted on property rights through a void law an injunction will issue to restrain its enforcement. *Dobbins* v. *Los Angeles* (1904) 195 U. S. 223; *Mobile* v. *L. & N. Ry. Co.* (1887) 84 Ala. 115. The court usually passes on the validity of the law, *Canal Co.* v. *Lee* (1892) 2 Colo. App. 184; *Davis* v. *Fasig* (1890) 128 Ind. 271; *So. Exp. Co.* v. *Mayor* (1902) 116 Fed. 756; *C. R. R. of N. J.* v. *Penn., Ry. Co.* (1879) 31 N. J. Eq. 475, 493, and allows an injunction to prevent multiplicity of suits, *Poyer* v. *Des Plaines* (1887) 123 Ill. 111; *Denver* v. *Beede* (1898) 25 Colo. 172, although some courts require previous adjudication of invalidity as a condition of relief. *Cohen* v. *Commissioners* (1877) 77 N. C. 2; *Wallach* v. *Society* (1876) 67 N. Y. 23. The principal case recognizes and follows the rule and its exceptions. See also 6 COLUMBIA LAW REVIEW 345.

EQUITY—TAXPAYER ENJOINING GOVERNMENTAL OFFICER.—A city's census was fraudulently padded so that saloons could be operated. The plaintiffs, taxpayers, petitioned for injunctive relief to correct the census. *Held*, that the relief should be granted. *Semmes* v. *Needles* (Ia. 1908) 114 N. W. 304.

The principle that an injunction is granted only to protect property rights does not apply when the government, state or federal, requires the assistance of equity in the performance of its duties; *In re Debs* (1894) 158 U. S. 564; *Att. Gen.* v. *Ry. Cos.* (1874) 35 Wis. 425; *People* v. *Tool* (1905) 35 Colo. 225; see 7 COLUMBIA LAW REVIEW 357; and there is authority that a taxpayer also may enforce public rights, when his pecuniary interests are threatened. 1 Spelling, Injunctions, § 614; *Jorger* v. *Township* (1872) 36 Ia. 175; *Territt* v. *Town of Sharon* (1867) 34 Conn. 105; contra, *Doolittle* v. *Supervisors* (1858) 18 N. Y. 155 [but see, *Ayers* v. *Lawrence* (1874) 59 N. Y. 192, which construes statutory remedy now given to taxpayers]. But a resident since he has no pecuniary interest is not entitled to relief. *Caruthers* v. *Harnett* (1886) 67 Tex. 127. To allow a taxpayer to interfere by injunction with the workings of the government when his interest is not pecuniary would seem to promise too great a degree of uncertainty and disorganization ever to be justified.

EVIDENCE—CHARACTER—PROOF BY SPECIFIC ACTS.—In an action by an administrator to set aside a contract made by his testator with the defendant, a niece, and to compel restitution of property transferred on the grounds of

mental incompetency and undue influence, the defendant claimed that she was a favorite of her uncle. The plaintiff, having shown without objection that the testator, who had known the defendant intimately for many years, had said that he disliked her because "she is always in trouble with somebody," submitted, in corroboration, evidence of specific acts of ill-temper and quarrelsomeness by the defendant when the testator was not present. *Held*, the evidence was admissible. *Curtice* v. *Dixon* (N. H. 1907) 68 Atl. 587.

Admitting that the character of the niece was admissible in evidence in the principal case as being relevant to the issue and not evidentiary of the doing of any act in litigation, *Tompkins* v. *Starr* (1884) 41 Oh. St. 305, the question remains as to how it may be proved. Excepting the characteristics of inanimate objects and the traits of animals, the sole species of *facta probanda* in the nature of character which may be evidenced by specific acts is the incompetency of an employee in an action against an employer, *Morrow* v. *St. Paul City Ry. Co.* (1898) 74 Minn. 480; *Continental Match Co.* v. *Swett* (1898) 61 N. J. 457, which evidence tends also to show knowledge on the part of the employer. *Pittsburg etc. Ry. Co.* v. *Ruby* (1871) 38 Ind. 294. This so-called negligent or careful disposition, although allowed to be proved by specific acts in a rare case outside the class above, *Plummer* v. *Onipee* (1879) 59 N. H. 55, is not easily distinguishable from habit, 1 Wig. Ev. § 65, has been held to be provable by specific acts only, *Park* v. *R. R. Co.* (1898) 155 N. Y. 215, and, in view of the familiar and inflexible rule requiring proof of character by evidence of general reputation, seems not to furnish an exception to sanction the holding in the principal case.

INTERSTATE COMMERCE—SHERMAN ACT—STRIKES.—The complaint alleged that the plaintiffs, hat manufacturers, had an extensive interstate trade, and that the defendants had effectively combined to interfere with their production by strikes, and to boycott dealers in their products in other states. *Held*, on demurrer, that a cause of action was stated under the Sherman Anti-Trust Act. *Loewe* v. *Lawlor* (U. S. 1908) 28 Sup. Ct. 301.

Mere production is not commerce within the meaning of the Constitution. Cf. *U. S.* v. *E. C. Knight Co.* (1894) 156 U. S. 1. Though an agreement to restrict production might substantially affect commerce through the operation of economic causes, it would seem to be without the control of Congress, since too indirect an interference. Cf. *U. S.* v. *E. C. Knight Co., supra; Addyston Pipe & Steel Co.* v. *U. S.* (1899) 175 U. S. 211; *Anderson* v. *U. S.* (1898) 171 U. S. 604. Recent decisions show a tendency to regard the potency of the effect as an important element in determining jurisdiction, *Northern Securities Co.* v. *U. S.* (1904) 193 U. S. 197; *Swift* v. *U. S.* (1905) 196 U. S. 375; *Montague* v. *Lowry* (1904) 193 U. S. 38, but it is doubtful whether such a test would be applied where the result is accomplished only through the mediate channel of production. In the two cases last cited, provisions of the agreement in respect of intrastate commerce were restrained on the ground that, in addition to their being inseparably bound up with other provisions affecting interstate commerce, they were parts of a scheme of which restraint of interstate trade was the general purpose. See 5 COLUMBIA LAW REVIEW 388. If intention is a test, and intention is to be determined by natural and probable consequences, it is difficult to see any limits to the control of Congress. Logical adherence to this or any other rule is unlikely. To hold a strike among employees in a productive industry of itself a violation of the act would carry the reasoning of the most drastic cases to an extreme. The decision in the principal case is, however, justifiable on the basis of a boycott in interstate sales, thus falling within the authority of well settled cases; *Montague* v. *Lowry, supra;* though in the present unsettled condition of the law, each application to a new set of facts marks an advance.

MUNICIPAL CORPORATIONS—LACHES.—For nine years the plaintiff, a city, made no claim to taxes which were collected within its boundaries by the county to which it was entitled by its charter. *Held*, the city was barred by laches. *City of Sanford* v. *Orange County* (Fla. 1908) 45 So. 479.

Succeeding to the privilege of the king not to be barred by lapse of time, Bac. Abr., Prerog., E. 6, the state, unless a nominal party, *U. S.* v. *Beebe* (1887) 127 U. S. 338, is not barred by laches. *U. S.* v. *Insley* (1888) 130 U. S. 263; *U. S.* v. *Hoar* (1821) 2 Mason 311; contra, *Hepburn's Case* (Md. 1830) 3 Bland 95, 111. This immunity it possesses that the public interests may be secured against the negligence of officials. *U. S.* v. *Hoar, supra.* Since a municipal corporation acting for the public is granted the same exemptions as the state, 7 COLUMBIA LAW REVIEW 290; *Hennessy* v. *New Bedford* (1891) 153 Mass. 260, laches should not be attributed to it in the assertion of a public right. *Check* v. *City of Aurora* (1882) 92 Ind. 107; *Cross* v. *Morristown* (1867) 18 N. J. Eq. 311; Dill., Mun. Corp., 4th Ed., § 675; contra, *City of Wheeling* v. *Campbell* (1877) 12 W. Va. 36; *Simpson* v. *Stoddard Co.* (1902) 173 Mo. 421. Many courts have attempted to avoid this rule because of possible injustice to individuals losing sight of the sound public policy on which it is based, and have sought to apply the doctrine of estoppel. 8 COLUMBIA LAW REVIEW 143. These cases are unsatisfactory as there appear neither the representation nor the reliance upon it which are essential to make out an estoppel, *Ackerman* v. *True* (1903) 175 N. Y. 353, so that laches would seem the real ground of decision. These cases evince an indefinite tendency to relieve against the negligence of a municipal corporation, but they, with the principal case, seem unsound in barring a municipality in the assertion of a public right. *Logan County* v. *City of Lincoln* (1876) 81 Ill. 156.

MUNICIPAL CORPORATIONS — POWERS — WATERWORKS — TAXATION.—A city erected waterworks to supply itself and its inhabitants with water. *Held*, such property was exempt from taxation under a statute providing for exemption of public property devoted to public purposes. *Commonwealth* v. *City of Covington* (Ky. 1908) 107 S. W. 231.

While it is suggested that provisions for a water supply are more properly subjects of private enterprise, Abbott, Municipal Corporations, § 455, the courts have universally granted municipal corporations the right to provide water, as well as light, for their own use; *David* v. *Portland Water Course* (1886) 14 Ore. 98; *Livingston* v. *Pippin* (1858) 31 Ala. 542; and they may also incidentally supply their citizens, *Kane* v. *The Mayor* (1859) 15 Md. 240; cf. *Crawfordsville* v. *Braden* (1891) 130 Ind. 149, this being frequently justified as a valid exercise of the police power. *Ellinwood* v. *City of Reedsburg* (1895) 91 Wis. 131; *Crawfordsville* v. *Braden, supra.* Property so used is everywhere considered as being employed for a public purpose; *Warner* v. *Town of Gunnison* (1892) 2 Colo. App. 430; *Smith* v. *Inhabitants of Lincoln* (1898) 170 Mass. 488; and, in accord with the principal case, not subject to taxation. *Smith* v. *Nashville* (1889) 88 Tenn. 464; *West Hartford* v. *Board of Water Comrs.* (1877) 44 Conn. 360; *City of Rochester* v. *Town of Rush* (1880) 80 N. Y. 302.

PERSONAL PROPERTY—SELF-HELP.—The rafts of the plaintiff, a logging company, threatened the defendant's bridge, the repair of which temporarily obstructed the stream. To avert injury the defendant cut the rafts causing loss to the plaintiff. *Held*, the defendant could not thus destroy property to save his own. *Meadows* v. *Gulf etc. Co.* (Tex. 1908) 107 S. W. 83.

Self-help may be exercised in defense of property to prevent a threatened unlawful injury, *Aldridge* v. *Wright* (1873) 53 N. H. 398, which legal process would be ineffectual to avert, *Graves* v. *Shattuck* (1857) 35 N. H. 257, where the comparative values are not unreasonably disproportionate, *Morse* v. *Nixon* (N. C. 1873) 6 Jones L. R. 293, 296; *Russell* v. *The Mayor* (N. Y. 1845) 2 Denio 461, 488, or where a nuisance is shown. *Toledo etc. Ry. Co.* v. *Loop* (1894) 139 Ind. 342. Logging companies using navigable streams are liable for injuries they occasion either by

negligence or unreasonable use, *Coyne* v. *Miss. etc. Lumber Co.* (1898) 72 Minn. 533; *Hunter* v. *Lumber Co.* (1901) 39 Ore. 448; *Lumber Co.* v. *Keel* (1899) 125 Ala. 603; *Outterson* v. *Gould* (N. Y. 1894) 77 Hun 429, and are held to have constructive notice of lawful obstructions. *The Echo* (1884) 19 Fed. 453. As in the principal case the bridge repairing was a lawful obstruction, *Nav. Co.* v. *Chesapeake etc. Co.* (1888) 88 Ky. 1, the threatening of the bridge was unlawful since it would have been unreasonable if with actual knowledge. The principal case seems, therefore, unsound in denying the defendant his right of self-help.

PLEADING AND PRACTICE—STATUTE OF LIMITATIONS—EFFECT OF DISABILITY IN REAL ACTIONS UNDER NEW YORK CODE.—The cause of action accrued in 1878. The infant became of age in 1881. Suit was brought in 1899. *Held*, the action was not barred. *Muller* v. *Manhattan Ry. Co.* (1908) 108 N. Y. Supp. 852.

Section 375, N. Y. Code Civ. Proc., applying the statute of limitations to persons under disabilities, provides that "the time of such disability is not a part of the time limited * * * for commencing the action * * * except that the time so limited cannot be extended more than ten years after the disability ceases." The construction of this troublesome section as laid down by a line of decisions in the Court of Appeals, *Howell* v. *Leavitt* (1884) 95 N. Y. 617; *Darrow* v. *Calkins* (1897) 154 N. Y. 503; *Brown* v. *Doherty* (1906) 185 N. Y. 383, may be summarized as follows: (1) The infant is entitled to twenty years after majority unless this period gives more than thirty years after the accrual of the cause of action; (2) in such case, thirty years after the accrual of the cause of action; but (3) if the latter period fails to give ten years after majority, then ten years after majority. The intention of § 375, *supra*, apparently is to give the infant at least ten years in which to commence the action. A simpler rule, fully effecting this intention, would give the infant twenty years from the accrual of the cause of action and in case that period terminated within ten years after majority, then ten years after majority. Concurring opinion of Laughlin, J., *Taggart* v. *Manhattan Ry. Co.* (1907) 109 N. Y. Supp. 38. Such a rule would accord with the rule in personal actions. *Matter of Rogers* (1897) 153 N. Y. 316; *Hyland* v. *N. Y. & H. R. R. R. Co.* (N. Y. 1897) 24 App. Div. 417. The principal case follows rule (1) *supra*.

QUASI-CONTRACTS—RECOVERY OF MONEY PAID BY MISTAKE.—A bank paid a check on a forged indorsement and the drawer delayed for six weeks after discovering the forgery to notify his bank. *Held*, as the bank that had first paid the check had failed and the defendant bank would thus be prejudiced by the delay, the drawer could not recover. *Cunningham* v. *First Nat'l Bank* (Pa. 1907) 68 Atl. 731. See NOTES, p. 404.

REAL PROPERTY—EASEMENTS—VARIATION IN USER.—The plaintiff's property abutted the defendant's elevated railway structure. An action for damages occasioned by an alleged excess of user consisting, *inter alia*, of an increase in the length and frequency of trains, was brought. *Held*, the user was measured by the elevated structure as an entirety, and that the variation was immaterial. *Bremer* v. *Manhattan Ry. Co.* (1908) 38 N. Y. Law Jour., No. 142. See NOTES, p. 401.

REAL PROPERTY—EASEMENT OF SUPPORT—DAMAGES FOR DEPRECIATION.—The removal of minerals by the owner of the subjacent stratum, caused a subsidence of the soil of the surface owner, resulting in serious injury to his mills. *Held*, damages would not be allowed for depreciation in market value because of apprehension of future injury. *West Leigh etc. Co.* v. *Tunnicliffe* (1907) 77 L. J. Ch. 102.

The right of a surface owner to support was formerly held an absolute right to support as such, *Nicklin* v. *Williams* (1854) 23 L. J. Exch. 335, but is now settled in England to be merely an incident to the general right of an owner to the ordinary enjoyment of his land. *Backhouse* v. *Bonomi* (1861) 9 H. L. C. 502; contra, *Noonan* v. *Pardee* (1901) 200 Pa. St. 474.

The physical injury resulting from subsidence, not the failure to leave sufficient supports, creates the cause of action. *Mitchell* v. *The Darley etc. Co.* (1884) 53 L. J. Q. B. 471; affirmed (1886) L. R. 11 App. Cas. 127; *Church etc.* v. *Paterson etc. R. R. Co.* (1901) 66 N. J. L. 218; contra, *Noonan* v. *Pardee, supra.* Though future losses may be the direct consequence of the existing excavation, since the latter is not of itself a legal injury, it logically follows that damages may not be given for such apprehended losses. Hence, present depreciation in market value, depending, as it does, upon the prospect of future injury, cannot be considered in assessing damages.

SALES—WAREHOUSE RECEIPTS—DELIVERY OF POSSESSION—MISTAKE AS TO LOCATION OF GOODS.—In a bargain and sale the warehouse receipt for a bale of cotton was transferred and the contract price paid. Without the knowledge of either party the cotton had previously been surrendered by the warehouseman to a stranger. *Held,* on tendering the warehouse receipt, the buyer might recover the purchase money. *Livingston* v. *Anderson* (Ga. 1907) 58 S. E. 505.

The transfer of a bill of lading operates as a delivery of the goods designated. *Sanders* v. *MacClean* (1883) 11 Q. B. D. 327, 341. Other documents of title, however, are generally regarded merely as tokens of authority to receive possession, delivery not being effected until the bailee has attorned to the assignee. *Farina* v. *Home* (1846) 16 M. & W. 119; *M'Ewan* v. *Smith* (1849) 2 H. L. Cas. 309; *Keeler* v. *Goodwin* (1873) 111 Mass. 490. But many American jurisdictions treat warehouse receipts like bills of lading in this respect; *M'Neil* v. *Hill* (C. C. 1865) 1 Woolw. 96; *Davis* v. *Russell* (1878) 52 Cal. 611. By issuing a receipt the warehouseman consents in advance to become bailee for any *bona fide* holder. *Durr* v. *Hervey* (1884) 44 Ark. 301. See Burdick, Sales, 2nd Ed., § 272. But inasmuch as the warehouseman in the principal case never had possession of the cotton at any time while the vendee held the receipt, no bailment in the buyer's favor could arise. See Van Zile, Bailments, § 19. And since the warehouseman did not attorn to the buyer after the transfer, under the older view of warehouse receipts also the vendor has failed to perform his engagement to deliver possession. *Buddle* v. *Green* (1857) 27 L. J. Exch. 33; cf. *Salter* v. *Williams* (1841) 2 M. & Gr. 650. Accordingly, in absence of evidence, such as a custom, that the acceptance of a receipt discharged the seller's whole undertaking, *Whitlock* v. *Hay* (1874) 58 N. Y. 484, the buyer may sue on the breach of contract or rescind and reclaim the contract price. *Winside Bank* v. *Lound* (1897) 52 Neb. 469. Recovery, in a quasi-contract action, of the amount paid has been allowed in a similar case on the ground that the mutual mistake as to the location of the goods was so fundamental as to prevent the formation of a valid contract. *Ketchum* v. *Catlin* (1849) 21 Vt. 191. Cf. *Michel* v. *Ware* (1874) 3 Neb. 229.

STATUTES—MECHANICS' LIENS—LIBERAL CONSTRUCTION.—Portable machinery was purchased to fit up an empty building as a factory. *Held,* Ingraham, J., dissenting, the machinery set up constituted an "improvement" entitling the contractor to a mechanics' lien under the liberal construction provided for in the mechanics' lien law. *Griffin* v. *Ernst* (1908) 108 N. Y. Supp. 816.

Mechanics' liens are creatures of statute, the terms of which must be examined to ascertain whether a lien may be given. Sec. 3, Laws of 1897 Chap. 418, indicates that material to be protected by a lien must be intended for annexation so as to become a part of the realty. *Spruhen* v. *Stout* (1881) 52 Wis. 517; *Sears* v. *Wise* (1900) 52 App. Div. 118. Thus the general principles of the law of fixtures should determine the existence of a lien. *Baker* v. *Fessenden* (1880) 71 Me. 292; *Dimmick* v. *Cook Co.* (1897) 115 Pa. St. 573; see 2 COLUMBIA LAW REVIEW 407. The machinery in the principal case, being removable at pleasure is not a fixture and should not properly be the subject of a mechanics' lien. Sec. 22, Laws of 1897

Chap. 418, providing for "liberal construction" so that "a substantial compliance" shall be sufficient, would seem to indicate that liberal construction should be used only in aid of defects of practice and not, as in the principal case, to extend the substantive law. See 27 Cyc. 20; *Shaw* v. *Young* (1895) 87 Me. 271; *Turridy* v. *Wright* (1895) 144 N. Y. 519, 522.

SURETYSHIP—DISSOLUTION AND APPEAL BONDS.—The plaintiff, having sued A, attached property which was released by a dissolution bond given with B as surety. After judgment A appealed and the defendant with B's consent became surety on an appeal bond. The plaintiff released B and sued on the appeal bond. *Held*, the release of B discharged the defendant's liability. *Day* v. *McPhee* (Col. 1908) 93 Pac. 670.

A bond given to dissolve an attachment stands in lieu of the attached property, and a surety thereon is liable for any judgment rendered. *Jayne's Ex'r's* v. *Platt* (1890) 47 Oh. St. 262; *Sutro* v. *Bigelow* (1872) 31 Wis. 527. Sureties on appeal and dissolution bonds are not co-sureties, and one or the other is primarily liable. *Hartwell v. Smith* (1864) 15 Oh. St. 200. Where the appeal bond is taken without the consent of the dissolution bond surety, the last in time is primarily liable, *Chrisman* v. *Jones* (1879) 34 Ark. 73, but a surety on an appeal bond executed with the consent of the prior surety is subrogated to the rights of the creditor on the dissolution bond. *Hartwell* v. *Smith, supra.* While a creditor need not first proceed against the principal, *Babbitt* v. *Finn* (1879) 101 U. S. 7, nor exhaust collateral save where special circumstances exist, *Hayes* v. *Ward* (1819) 4 Johns. 123, a release by the creditor of collateral to which the surety may be subrogated, releases the surety *pro tanto*. *Cullum* v. *Emanuel* (1840) 1 Ala. 23. The plaintiff's release of B in the principal case would, therefore, release the defendant, since, on payment of his obligation, he would be subrogated to the creditor's rights against B.

TAXATION—NEW YORK TRANSFER TAX ACT—PROPERTY OF NON-RESIDENT DECEDENT—TESTACY AND INTESTACY.—A resident of Massachusetts, dying intestate, left personalty both there and in New York. The New York Transfer Tax Act, Tax Law, § 220, Subd. 2, sets a tax on all transfers by will or intestate law from a non-resident decedent, of property within the state. One group of distributees fell within the exemptions of the statute. Id., § 221. *Held*, the Massachusetts administrator could not deprive the State of New York of its *pro rata* tax on the succession of the non-exempt distributees, by paying them out of Massachusetts assets and applying the New York property wholly toward the satisfaction of the shares of the exempts. *Matter of Ramsdill* (1908) 190 N. Y. 492. See NOTES, p. 398.

TRUSTS—ACCUMULATIONS—DISPOSITION UNDER NEW YORK STATUTES IN CASE OF INVALID DIRECTION.—A testator devised the residue of his estate upon trust to his executors to pay the income to his wife for life, and directed that upon her death a part of the residue should go to a charitable corporation to be formed by the executors within two lives in being, and declared that in case his intention with respect to the said institution for girls should because of illegality fail or become impossible of realization, the property should go to the Smithsonian Institute. The wife perished with the testator and the Andrews Institute was subsequently formed as directed. The question was as to who should take the undisposed of income which had accrued prior to the formation of the Andrews Institute. *Held*, that it passed to the next of kin under the Statute of Distributions. *St. John* v. *Andrews Institute for Girls* (N. Y. 1908) 81 N. E. 981. See NOTES, p. 394.

TRUSTS—AUTHORITY OF SUBSTITUTED TRUSTEE—DISCRETIONARY POWERS.—A will creating a trust gave to the designated trustees, who later resigned, a discretionary power to sell the trust *res* and apply it to the use of the *cestui*. The plaintiff, a substituted trustee, attempted to exercise the

power. *Held,* Ingraham and Houghton, JJ., dissenting, the power being personal to the trustees named did not pass to the plaintiff. *Smith* v. *Floyd* (1908) 108 N. Y. Supp. 775.

It was originally held that wherever a discretionary power was given by a testator, he thereby indicated a personal confidence in his appointee's judgment and it did not pass to a substituted trustee. Vin. Abr., tit. Char. Uses C. 16; *Cole* v. *Wade* (1809) 16 Ves. Jr. 27. Later cases hold that the exercise of discretion is not the test but that such powers pass as are given *ex officio* and appear to attach to the office rather than to the incumbent. *In re Smith* [1904] 1 Ch. 139; *Crawford* v. *Forschaw* [1891] 2 Ch. 261; *Safe Deposit Co.* v. *Sutro* (1892) 75 Md. 361; contra, *Edwards* v. *Maupan* (D. C. 1888) 7 Mack. 39; *Belote* v. *White* (Tenn. 1857) 2 Head. 703. Moreover, the question being one of the construction of a will the intention of the testator should be controlling. See Farwell, Powers 457. The testator may fairly be presumed to know of the court's power to appoint new trustees, see Code Civ. Proc. § 2808, and in the absence of a clearly expressed contrary intention to have intended the power to pass. *Sawtelle* v. *Withams* (1896) 94 Wis. 412. In the principal case no such contrary intention being present the decision seems unsound on principle and authority, *Wilson* v. *Pennock* (1856) 27 Pa. St. 238; *Seels* v. *Delagado* (1904) 186 Mass. 25, and irreconcilable on any sound reasoning with previous New York decisions. *Lahey* v. *Kortright* (1892) 132 N. Y. 450; *Matter of Wilkin* (1905) 183 N. Y. 104.

TRUSTS—PERPETUITIES IN NEW YORK—LIMITATIONS OF SEPARATE ESTATES.—The testator by trust deeds in his lifetime had created a trust of personalty for the life of A; by his will he disposed of the reversion in trust for the lives of B and C. A was alive at the testator's death. *Held,* the testamentary trust was valid. *N. Y. Life Ins. & Tr. Co.* v. *Cary* (1908) 191 N. Y. 33.

The trust of the reversion, because of the already existing suspension, would seem to contravene the provision that "the absolute ownership of personal property shall not be suspended by any limitation or condition for a longer period * * * than two lives in being * * * at the death of the testator." Pers. Prop. L. § 2. The court rests on the proposition that an expectant estate can be dealt with in the same manner as an estate in possession; Real Prop. L. § 49; but it has never been assumed that a legal life estate in possession preceding a reversion suspended by a trust for two lives can itself be suspended in trust. To reach its result the court must assume the different and incorrect proposition that a reversion may be dealt with as though an absolute fee. The authorities cited are distinguishable: both the dictum in *Genet* v. *Hunt* (1889) 113 N. Y. 158, 168, and the *ratio decidendi* of *Livingston* v. *N. Y. L. Ins. & Tr. Co.* (1891) 13 N. Y. Supp. 105 (which, however, contains dicta in accord), assume a suspension of the remainder after the former suspension had terminated. A rejection of the principal case would, where the legal estate is divided among several, permit the one who first suspended his estate to preclude the others from putting theirs in trust. But the rule laid down permits the creation of perpetuities; since the process of cutting into the reversion could be infinitely continued, thus allowing new limitations for lives not in being when earlier and still existing estates were created; and this novel interpretation would be applicable to realty. *Manice* v. *Manice* (1871) 43 N. Y. 303, 382. The situation results from the adoption of the suspension of alienation theory of perpetuities; since, where the Rule deals with remote vesting, the limitation of the reversion cannot bring a prior limitation of a particular estate within the Rule.

WILLS—EXECUTORY DEVISES OF WHAT REMAINS.—A will gave the testator's property to his wife absolutely; in case of her marriage so much as had not been consumed, to vest in his children. *Held,* on the marriage the property vested in the children, as the executory devise was valid. *Littler* v. *Diemann* (Tex. 1908) 106 S. W. 1137. See NOTES, p. 397.